

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROBERT DURALL,

Petitioner,

v.

KENNETH QUINN,

Respondent.

No. 06-cv-01012-MJP-MAT

ORDER ADOPTING REPORT AND  
RECOMMENDATION AND  
DENYING PETITION FOR WRIT OF  
HABEAS CORPUS

**Overview**

State prisoner Robert Durall (“Durall”) has filed objections to the Magistrate Judge’s Report and Recommendation (“R & R”), which recommended denying Durall’s petition for a writ of habeas corpus. Upon review of the record (Dk. Nos. 4, 13, 16, 19, 20, 21) and documents submitted by the parties, this Court ADOPTS the Magistrate Judge’s R & R<sup>1</sup> and DENIES Durall’s petition.

**Background**

This Court adopts the factual and procedural background of this case as set forth in the R& R.

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<sup>1</sup>While this Court adopts the R & R’s ultimate conclusions and much of its reasoning, there are some issues for which this Court wishes to put its own legal analysis on the record. For other issues, this Court will adopt the R & R’s analysis without significant elaboration.

## Standard of Review

Regarding claims that were adjudicated on the merits in state court, this Court may only grant habeas relief if the state court decision was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent, or if the state court decision was based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d). In conducting this inquiry, this Court reviews the “last reasoned decision” of the state courts. See, e.g. Robinson v. Ignacio, 360 F.3d 1044, 1055 (9<sup>th</sup> Cir. 2004). For most of Durall’s claims, the last reasoned decision was the decision of the Washington Supreme Court Commissioner (“Commissioner”) denying review of Durall’s Personal Restraint Petition.

This Court may not grant habeas relief on a particular claim if a petitioner failed to exhaust state court remedies as to that claim and the claim would now be procedurally barred in state court. See Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991).

## Analysis

### **A. Durall’s Sixth Amendment right to counsel was not violated by the introduction of notes and testimony from Durall’s private investigator.**

Durall argues that he was denied his Sixth Amendment right to counsel when the prosecution introduced notes and testimony from Durall’s conversation with his private investigator. The Commissioner held that, even if the introduction of this evidence violated Durall’s attorney-client privilege, the privilege is not of constitutional magnitude. Furthermore, the Commissioner held that Durall did not suffer prejudice from the claimed error.

The Commissioner’s two grounds for denying relief were not unreasonable. Regarding the first ground, Durall cannot point to any Supreme Court case holding that the introduction of evidence in violation of attorney-client privilege violates the Sixth Amendment. The closest case is Weatherford v. Bursey, 429 U.S. 545 (1977), which stated (in dicta) that government eavesdropping on attorney-client conferences, coupled with introduction of evidence gleaned by such eavesdropping, *may* violate

1 the Sixth Amendment. Id. at 552. But Weatherford did not address the introduction of evidence  
2 without prior government eavesdropping or malfeasance. Furthermore, at least two Circuits have held  
3 that the mere introduction of evidence in violation of attorney-client privilege does *not* violate the  
4 Sixth Amendment. See United States v. Mett, 178 F.3d 1058, 1066 (9<sup>th</sup> Cir. 1999); Lange v. Young,  
5 869 F.2d 1008, 1012 n.2 (7<sup>th</sup> Cir. 1989). In light of Weatherford's ambiguity, and lower court rulings  
6 on the issue, it was not unreasonable for the Commissioner to determine that introducing evidence in  
7 violation of attorney-client privilege does not violate the Sixth Amendment.

8       Regarding the prejudice ground, the Commissioner reasonably determined that Durall was not  
9 substantially prejudiced by the introduction of the private investigator ("P.I.") evidence. The  
10 prosecution mainly used the P.I. evidence to indirectly discredit the testimony of Dignoraah Perez, a  
11 convenience store clerk who testified to seeing Carolyn alive one day *after* Durall had allegedly killed  
12 her. The P.I. evidence disclosed that Durall never bothered to tell his private investigator about  
13 Perez's story, thus implying that Durall knew Perez's story was false.

14       It is true, as Durall argues in his objections to the R & R, that Perez was a powerful defense  
15 witness and it was important for the prosecution to discredit her testimony. However, the prosecution  
16 did so in multiple ways besides the introduction of the P.I. evidence. For instance, the prosecution  
17 introduced e-mails that Durall wrote to acquaintances regarding Carolyn's disappearance, in which he  
18 omitted any mention of Perez's story and instead stated that no one had seen Carolyn since the  
19 previous day. These e-mails created the same inference as the P.I. evidence – namely, that Durall  
20 knew Perez was mistaken and therefore deliberately didn't relay her story to others. Viewing the  
21 evidence as a whole, the P.I. evidence was not an indispensable part of the prosecution's case and  
22 Durall was not substantially prejudiced by its introduction. The P.I. evidence did not have a  
23 "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson,  
24 507 U.S. 619, 637 (1993).

**B. Durall's rights to due process and a fair and impartial jury were not violated by two instances of juror misconduct.**

Durall argues that he was denied his rights to due process and a fair and impartial jury by two instances where jurors engaged in ex parte communication with third parties about his case. The last reasoned decision of the state courts on this claim was the decision of the Washington Court of Appeals on direct review of Durall's conviction. The Court of Appeals concluded that Durall had not made a sufficient showing that the jurors' ex parte communications prejudiced him.

The Court of Appeals' conclusion was not unreasonable. Durall's main objection is that the Court of Appeals placed the burden on him to show prejudice, rather than putting the burden on the state to show that the ex parte communications were harmless. He cites to Remmer v. United States, 347 U.S. 227 (1954) for the proposition that ex parte communications with a juror about the pending case are presumptively prejudicial and the Government bears the burden of showing harmlessness. Id. at 229 (citing Mattox v. United States, 146 U.S. 140, 148-50 (1892)).

However, as the R & R points out, the prejudice presumption of Remmer has been limited to instances of juror *tampering*, rather than other communications with jurors. See United States v. Dutkel, 192 F.3d 893, 895-96 (9<sup>th</sup> Cir. 1999). Under Dutkel, tampering involves "an effort to influence the jury's verdict by threatening or offering inducements to one or more of the jurors." Id. at 895. None of the ex parte communications in this case involved any coercion or inducements of jurors. Thus, the Court of Appeals was not unreasonable in placing the burden on Durall to show prejudice.

In his objections to the R & R, Durrell cites Caliendo v. Warden of California Men's Colony, 365 F.3d 691 (9<sup>th</sup> Cir. 2004) for the proposition that ex parte communications with jurors are presumptively prejudicial under the Remmer and Mattox line of cases. However, Caliendo explicitly limited its holding to jurors' communicating with "a witnesses or interested party." 365 F.3d at 696. No such communications occurred in Durall's case.

1 **C. Durall's rights under the Confrontation Clause were not violated by the introduction of**  
2 **hearsay statements from Carolyn's acquaintances.**

3 The Commissioner determined that the introduction of hearsay statements against Durall did  
4 not violate his rights under the Confrontation Clause because those hearsay statements were not  
5 "testimonial" in nature. This conclusion was reasonable. This Court agrees with the R & R – and the  
6 Commissioner – that the hearsay statements were not "testimonial" and thus not barred by the  
7 Confrontation Clause.

8 **D. Providing transcripts of Durall's suppression hearing to the jury during deliberations**  
9 **did not violate Durall's Sixth Amendment right to an impartial jury or his Sixth**  
10 **Amendment right to be present during all critical stages of his trial.**

11 The last reasoned decision addressing this issue was the decision of the Court of Appeals on  
12 direct review. The Court of Appeals did not address the constitutional aspects of this issue, instead  
13 focusing on whether the trial court abused its discretion as a matter of evidentiary law by providing the  
14 jury with the suppression hearing transcripts.

15 Nonetheless, this Court adopts the R & R's conclusion that providing these transcripts to the  
16 jury did not violate Durall's Sixth Amendment rights. While the Sixth Amendment provides a  
17 defendant with the right to be present at all stages of his trial, see Illinois v. Allen, 397 U.S. 337, 338  
18 (1970), it does not prevent a judge from providing exhibits to the jury during deliberations. See  
19 United States v. Sobamowo, 892 F.2d 90, 97 (D.C. Cir. 1989) ("defendant's presence not required  
20 when exhibits are submitted to the jury during deliberations").

21 Furthermore, while courts acknowledge that providing transcripts to jurors may unduly  
22 emphasize the importance of those transcripts, no court has held that this problem implicates the Sixth  
23 Amendment right to a fair and impartial jury. See, e.g. United States v. Montgomery, 150 F.3d 983,  
24 999-1000 (9<sup>th</sup> Cir. 1998) (analyzing decision to provide transcripts to jury as a simple evidentiary  
25 matter rather than a Sixth Amendment issue).

1 **E. Durall was not denied effective assistance of counsel by his attorney's failure to obtain a**  
2 **written plea agreement in exchange for Durall's leading police to Carolyn's body.**

3 A claim for ineffective assistance of counsel requires that: (1) Counsel was deficient, and (2)  
4 The deficient performance prejudiced the defense. See Strickland v. Washington, 466 U.S. 668, 687  
5 (1984). The Commissioner denied Durall's claim on the first Strickland prong, holding that his  
6 counsel was not deficient for failing to obtain a written plea agreement because Durall hadn't show  
7 that the State ever offered such an agreement in exchange for his cooperation.

8 The Commissioner's decision was not unreasonable. Durall has provided no evidence, besides  
9 his own assertions, that the Government offered him a plea agreement in exchange for leading police  
10 to Carolyn's body. In the absence of any showing that a plea agreement was even offered, Durall's  
11 counsel logically cannot be deficient for failing to enshrine such hypothetical plea agreement in writing.

12 Durall alternatively argues that, even if the Government never offered a plea agreement, his  
13 counsel was deficient for falsely *telling* him that the Government had offered a plea agreement and  
14 thereby inducing him to lead police to Carolyn's body. But the Commissioner found that Durall's  
15 counsel said no such thing, and Durall has not shown that this factual finding was unreasonable.

16 In his objections to the R &R, Durall argues that his counsel *must* have told him about a plea  
17 agreement, because it is objectively unreasonable that he would have led police to Carolyn's body  
18 otherwise. But this circumstantial argument is insufficient to show that the Commissioner's factual  
19 findings were unreasonable. Durall admits that he has no *direct* evidence that his counsel ever told  
20 him about a plea agreement.

21 Because the Commissioner reasonably determined that Durall's counsel never made statements  
22 about any plea agreement, Durall has no claim for ineffective assistance of counsel arising out these  
23 alleged statements.  
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1 **F. Durall was not denied effective assistance of counsel when his attorney altered the**  
2 **agreement under which Durall led police to Carolyn's body in exchange for a**  
3 **Government promise not to introduce evidence that Dorall had led them there.**

4 The Commissioner appears to have denied this claim on the second Strickland prong, holding  
5 that Durall was not prejudiced by his counsel's alteration of the agreement. The Commissioner's  
6 determination was not unreasonable.

7 The agreement at issue originally stated, in relevant part, "the State has agreed not to seek to  
8 introduce at trial or to publicize beforehand any information relating to Mr. Durall's involvement in the  
9 discovery of the body of his wife." The agreement was subsequently modified by striking the phrase  
10 "or publicize beforehand" and inserting a final sentence: "If, however, the defense introduces such  
11 information in any court proceeding, the State is no longer bound by the provisions of this agreement."

12 When a defendant alleges ineffective assistance arising out of a *plea* agreement, prejudice will  
13 be found if a defendant shows that there was a reasonable probability he would not have entered into  
14 the agreement but for counsel's errors. Hill v. Lockhart, 474 U.S. 52, 59 (1985). Although Durall's  
15 agreement was an assistance agreement rather than a plea agreement, this Court concludes that Durall  
16 must at least satisfy the Hill standard to show prejudice. That is, he must show that there was a  
17 reasonable probability he would not have entered into the assistance agreement had he known about  
18 the altered terms.

19 Durall cannot make this showing, for the altered terms are quite minor in relation to the overall  
20 agreement. The added sentence, allowing the Government to introduce evidence about Durall's  
21 assistance if Durall does so first, would hardly be objectionable as it still gives Durall control over  
22 whether such evidence will be admitted. The deletion of the "publication" phrase is a closer call, but  
23 still is a fairly minor change. Any defendant facing trial for murder would be far more concerned with  
24 what evidence is admitted at trial rather than what information is publicized in other forums. A court  
25 could readily conclude that there was no reasonable probability Durall would have backed out of the

1 agreement merely on account of these minor alterations. Thus, Durall did not suffer prejudice, even if  
2 his counsel was deficient by altering the agreement without his consent.

3 This Court adopts the R & R's conclusion that Durall has procedurally defaulted on his  
4 argument that the alteration of the agreement violated his Fifth Amendment due process rights.

5 **G. Durall's constitutional rights were not violated by the admission of evidence that Durall**  
6 **failed to return a detective's call, "refused" a warrantless search, or hired counsel.**

7 The last reasoned decision of the state courts on this claim was the decision of the Washington  
8 Court of Appeals on direct review, which held that the introduction of this evidence did not violate  
9 any constitutional rights. The Court of Appeals' legal determination was not unreasonable.

10 Durall's failure to return the police officer's call and his "refusal" of a warrantless search were  
11 really one and the same act. Durall simply neglected to call back the officer who requested a  
12 warrantless search. Durall has provided no case law suggesting that introduction of this evidence  
13 violates either his Fourth Amendment right to be free from unreasonable searches nor his Fifth  
14 Amendment right to silence.

15 The introduction of evidence that Durall hired counsel shortly after Carolyn's disappearance is  
16 a more complicated matter. The Court of Appeals held that "[t]he fact that Durall had hired an  
17 attorney was raised by Durall himself to explain his inquiries about withdrawing money from his  
18 pension plan." However, the trial transcript clearly shows that the Government elicited testimony that  
19 Durall had hired counsel, during the direct examination of witness Allen Becker.

20 Some courts have held that the Sixth Amendment right to counsel prohibits a prosecutor from  
21 eliciting testimony that a defendant secured counsel, even if the defendant secured counsel before any  
22 criminal proceedings were instituted. See, e.g., United States v. MacDonald, 620 F.2d 559, 564 (5<sup>th</sup>  
23 Cir. 1980). However, there is no clear Supreme Court authority on this subject. Moreover, even  
24 highly protective courts will not consider it reversible error if the prosecutor briefly or "incidentally"  
25 elicits this prohibited testimony and does not emphasize it in his arguments. See, e.g., United States v.



1 Daoud, 741 F.2d 478, 480 (1<sup>st</sup> Cir. 1984); United States v. Milstead, 671 F.2d 950, 953 (5<sup>th</sup> Cir.  
2 1982).

3 In this case, the Government only briefly touched on Durall's obtaining counsel and made no  
4 mention of it in opening or closing arguments. Thus, the introduction of this evidence would not be  
5 reversible Sixth Amendment error even on direct review. It logically follows that Durall cannot obtain  
6 habeas relief on this ground. See Duckett v. Godinez, 67 F.3d 734, 742 (9<sup>th</sup> Cir. 1995).

7 For similar reasons, the prosecutor's eliciting of this testimony did not "so infect[] the trial  
8 with unfairness as to make the resulting conviction a denial of due process." Donnelly v.  
9 DeChristoforo, 416 U.S. 637, 643 (1974). The testimony that Durrall failed to return a phone call  
10 seems entirely unobjectionable, and the testimony that Durrall hired an attorney was elicited only in  
11 passing. Neither piece of evidence "infected the trial with unfairness" for due process purposes.

12 **H. Durall's double jeopardy rights were not violated when the jury's initial, sealed verdict**  
13 **was destroyed and the jury began deliberations anew with an alternate juror.**

14 The Commissioner determined that the jury's initial, sealed verdict was not a "final verdict"  
15 that terminated Durall's jeopardy. Thus, double jeopardy did not prohibit the trial judge from  
16 destroying that verdict, replacing a juror, and instructing the jury to deliberate anew.

17 The R & R concluded that the Commissioner's decision was reasonable, and this Court adopts  
18 the R & R's analysis of the issue. In his objections to the R & R, Durall argues that his situation  
19 creates a case of first impression in the field of double jeopardy. But this argument, if anything, merely  
20 reinforces this Court's conclusion that Durall may not achieve habeas relief on this claim. Durall bears  
21 the burden of showing that the state court's decision was, inter alia, an unreasonable application of  
22 clearly established Supreme Court precedent. See 28 U.S.C. § 2254(d). If there is no Supreme Court  
23 case law that clearly applies to Durall's situation, then Durall cannot meet the § 2254 standard for  
24 habeas relief.

**I. Durall's 560-month exceptional sentence did not violate his Sixth Amendment right to have a jury determine all the facts that increase punishment above the prescribed range.**

The last reasoned decision of the state courts analyzing this claim was the Commissioner's decision, although Durall framed this claim as a Blakely violation before the Commissioner and as an Apprendi violation before this Court. See Blakely v. Washington, 542 U.S. 296 (2004); Apprendi v. New Jersey, 530 U.S. 220 (2000).

This Court adopts the R & R's conclusion that "Petitioner's argument is essentially an argument that Blakely should be applied retroactively to his case." And, Blakely does not apply retroactively to convictions that were final before Blakely itself was announced. Schardt v. Payne, 414 F.3d 1025, 1038 (9<sup>th</sup> Cir. 2005).

In his objections to the R & R, Durall argues that Blakely should apply retroactively to his case because Blakely was pending before the Supreme Court during direct review of his conviction, and because he raised what were essentially Blakely arguments to the state courts at that time. But this argument does not change the simple fact that Durall's conviction became final some four months before the Supreme Court decided Blakely. Had Blakely been decided just four months earlier, Durall would have had the benefit of its holding. But this timing does not mean that he is exempt from the general rule that Blakely does not apply retroactively in habeas proceedings.

**J. Durall has procedurally defaulted on his argument that the judge violated his due process rights under McMillan v. Pennsylvania, 477 U.S. 79 (1986) by failing to apply a clear and convincing evidence standard to facts that enhanced Dural's sentence.**

This Court adopts the R & R's conclusion that Durall has procedurally defaulted on this McMillan claim by not properly raising it in the state courts within the state statute of limitations.

**K. Durall is not entitled to an evidentiary hearing on any of the above-captioned claims.**

In his objections to the R & R, Durall points out the R & R did not address whether this Court should conduct an evidentiary hearing on any of his claims. This Court concludes that no evidentiary

1 hearing is warranted. The vast majority of Durall's claims involve "issues that can be resolved by  
2 reference to the state court record," and thus there is no need for a hearing on these issues. Totten v.  
3 Merkle, 137 F.3d 1172, 1176 (9<sup>th</sup> Cir. 1998). The only issue that might conceivably be clarified by an  
4 evidentiary hearing is whether Durall's counsel falsely told Durall about a plea agreement, or whether  
5 the Government in fact *did* offer a plea agreement in exchange for Durall leading police to Carolyn's  
6 body. However, Durall failed to develop a factual basis for this claim in state court, and so this Court  
7 may not hold an evidentiary hearing on the subject. See 28 U.S.C. § 2254(e)(2); Baja v. Ducharme,  
8 187 F.3d 1075, 1078-79 (9<sup>th</sup> Cir. 1999).

### 9 Conclusion

10 None of Durall's claims of error afford a basis for Federal habeas corpus relief. Accordingly,  
11 this Court ADOPTS the Magistrate Judge's R & R and DENIES Durall's petition for a writ of habeas  
12 corpus.

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14 The Clerk is directed to send copies of this order to all counsel of record.

15 Dated: May 29, 2007.

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18 /s Marsha J. Pechman

19 Marsha J. Pechman

20 United States District Judge  
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